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HOWREY SIMON ARNOLD & WHITE, LLP			KIZILKAYA, MICHELLE R	
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MENLO PARK, CA 94025			1661	

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/957,489

Applicant(s)

BOEDER, MARK ROLAND

Examiner

Kizilkaya Michelle

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 5 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11/6/03.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☐ Claim(s) _____ is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____.

Objection to the Disclosure

37 CFR 1.163

The following is a quotation of section (a) of 37 CFR 1.163:

(a) The specification must contain as full and complete a disclosure as possible of the plant and the characteristics thereof that distinguish the same over related known varieties, and its antecedents, and must particularly point out where and in what manner the variety of plant has been asexually reproduced. In the case of a newly found plant, the specification must particularly point out the location and character of the area where the plant was discovered.

35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

In plant application filed under 35 U.S.C. 161, the requirements of 35 U.S.C. 112 are limited.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

As specific to United States Plant Patent applications, the specifics of 37 CFR 1.164 (reproduced below) are controlling:

The claim shall be in formal terms to the new and distinct variety of the specified plant as described and illustrated, and may also recite the principal distinguishing characteristics. More than one claim is not permitted.

In plant applications filed under 35 U.S.C. 161, the requirements of 35 U.S.C. are limited. The following is a quotation of 35 U.S.C. 162:

No plant patent shall be declared invalid for noncompliance with section 112 of this title if the description is as complete as is reasonably possible. The claim in the specification shall be in formal terms to the plant shown and described.

The disclosure is objected to under 37 CFR 1.163(a) because the specification presents less than a full and complete botanical description and the characteristics which distinguish over related known varieties.

More specifically:

A. Applicant should disclose information regarding observed fruit or seed production. If such has been observed applicant should provide a description of such in terms of amount, shape, dimensions and color.

Objection to the Disclosure

35 U.S.C. 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Grounds for Rejection

Claim 1 (the claim) is rejected under 35 U.S.C. 102(b) as the instant plant ‘Tutan Time’ was according to applicant, sold outside the U.S. as early as March 28, 1998 which was more than one year prior to the date of application for Plant Patent (September 19,2001) in the United States.

Applicant also admits that very selective and limited information from a CPVR application for said variety was published in the European Community Plant Variety Office (CPVO) Gazette and on the CPVO website.

Applicant further admits that limited information was made available in published Ficor Catalogs for the years 1998-2001. Said catalogs were publicly distributed in the United Kingdom and in Ireland more than one year prior to the U.S. file date for the purpose of selling the instant plant.

A printed publication can serve as a statutory bar under 35 U.S.C. 102(b) if the printed publication, combined with knowledge in the prior art, would have enabled one of ordinary skill in the art to reproduce the claimed plant, and said printed publication was published more than one year prior to the date of application in the United States (*In re LeGrice*, 301, f.2d 929, 133 USPQ 365 (CCPA 1962)). If one skilled in the art could have reproduced the plant from a publicly available source, then the publication describing the plant would have an enabling disclosure. See *Ex parte Thomson*, 24 USPQ-2d, 1618, 1620, (Bd. Pat. App.& Inter. 1992) (“The issue is not whether the [claimed] cultivar Siokra was on public use or sale in the United States but, rather, whether Siokra seeds were available to a skilled artisan anywhere in the world

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such that he/she could attain them and make/reproduce the Siokra cultivar disclosed in the cited publications.”). See also MPEP 2121.03.

As such, said publications combined with the knowledge in the prior art, would have enabled one of ordinary skill in the art to reproduce the claimed plant. Information regarding the claimed variety, in the form of the publications noted above, was readily available to interested persons of ordinary skill in the art.

A publication relied upon as prior art under 35 U.S.C. 102(b) must be enabling. The text of the relied upon publications standing alone would not have enabled one skilled in the art to practice the claimed invention. When a claim is drawn to a plant, the reference, combined with knowledge in the prior art, must enable one of ordinary skill in the art to reproduce the plant. The admission of prior sale and offer for sale more than one year prior to the filing date of the instant application enables the referenced documents because the disclosed cultivar could have been propagated from publicly available materials, and one skilled in the art would have the knowledge of how to do so, given the notoriety of various methods of asexual propagation. See, e.g., *Thomson*, supra. See also Cooper, "Biotechnology and the Law", Section 8.05, pages 8-15 to 8-16 (August 2000), Clark, Boardman, Callaghan ("In essence then, a plant patent applicant cannot lose his rights through public description of the new variety so long as he does not make the stock available for propagation by the public.").

Response to Arguments

(A)

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Applicant argues that the examiner's position is incorrect according to 102 (b) which states that the reference must place the public in possession of the invention. Clearly such is case when the invention in question is publicly available.

(B,H)

Applicant's assertion that 102 does not apply unless all elements of the invention are to found in a single reference is indeed correct. However, applicant is mistaken in applying such an argument as the admission of sale is not in fact a reference.

(C,G,H)

Applicant's contention that foreign commercial availability or public use is not a bar to patentability under 35 U.S.C. 102(b) is noted but is not relevant. The clear wording of 35 U.S.C. 102(b) is "A person shall be entitled to a patent unless - ... (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States...". There is no geographic limitation of the bar under 35 U.S.C. 102(b) to printed publications in this country. There is no requirement that a printed publication that describes the invention be printed or enabled in this country. The second clause of 35 U.S.C. 102(b) barring public sale or use in this country is not relevant because as noted above, the current rejection under 35 U.S.C. 102(b) is based on foreign published documents ("printed publications"), as enabled by the admitted public availability of the plants outside the United States more than one year prior to the date of domestic filing.

That the claimed plant was not available in the United States more than one year prior to the date of domestic filing is not persuasive to patentability, as there is no geographic component

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of enablement. For a patent specification to be enabling, there is no requirement that the starting material required to produce the claimed invention must be located in the United States. See, for example, *Ex parte Rinehart* 10 USPQ2d 1719, 1720 (Bd. Pat. App. & Inter. 1989), where a specification was found to be enabling even though the required biological material was not deposited, but was obtainable from specified locations in the ocean (specifically, only off the coast of Central and South America, as described in U.S. Patent 4,548,814, col. 1, lines 43-60).

Appellant asserts that the plant at issue was available only in a foreign country. This assertion is incorrect. In *LeGrice*, applicant never admitted that the rose cultivar was on sale anywhere. Instead applicant acknowledged, "Prior public use or sale are the avenues by which a plant enters the public domain" (133 USPQ at 371).

(D,E,F)

Appellant continues to maintain that the rejection under 35 U.S.C. 102(b) is improperly applied because the published citations (CPVO) are extremely limited in information and are therefore insufficient to describe the invention. Examiner concurs in this regard as the cultivar denomination, 'Tutan Time' is not on record according to examiner's search and in light of applicant's I.D.S. informing examiner that the instant plant in question was filed for Plant Breeder's Rights certificates under a different name.

In Conclusion

Appellant argues that *LeGrice* requires that a printed publication enable one skilled in the art to independently produce the claimed plant from starting material other than the claimed plant itself. This argument is not persuasive because the *LeGrice* decision does not impose such a

requirement. The *LeGrice* decision states, “Basically, section 102(b) requires that an inventor, who has placed his invention in the public domain, file his application within one year thereafter...” (133 USPQ 365, 371). Clearly, the court did not believe that the claimed plant was in the public domain. Absent public availability of the plant, the only means to produce it would be to independently re-create it by repeating the original hybridization and selection processes. While one could theoretically obtain the same plant by this method, the court correctly ruled that this would not be practical. The *LeGrice* decision essentially states that *mere words* could not put one skilled in the art in possession of the claimed plants. In the instant application, however, there is more than mere words – there is the ready public availability of the claimed plant itself, which would enable one skilled in the art to duplicate the plant many times over without further exercise of inventive skill.

It is also of interest to note that the Court cited Robinson on Patents, which listed the requirements for a document to be considered a “printed publication”. Among the requirements is that the document must be “so precise and so particular that *any person skilled in the art* to which the invention belongs can construct and operate it without experiments and without further exercise of inventive skill.” 133 USPQ at 369 (emphasis added). If a rose plant is commercially available, the nurseryman who sells the plant, or the amateur rose enthusiast who purchases it, would readily be able to reproduce the plant by cuttings, budding, grafting, etc., without undue experimentation or exercise of inventive skill.

The Court also noted that “...only an ‘enabling’ publication is effective as a bar to a subsequent patent. We do not agree with the view expressed by the examiner that this necessarily requires that plant publications be ‘totally ignored.’” 133 USPQ at 374. Applicant’s

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position appears to be that all printed publications are, by definition, non-enabling in the plant art and therefore no rejection can ever be made over a printed publication. This is contrary to what the *LeGrice* Court stated in their decision.

The Court concluded, “The mere description of the plant is not necessarily an ‘enabling’ disclosure.” 133 USPQ at 378. In the instant application, there is more than a “mere description” of the plant – there is also evidence of public availability of the same more than one year before the instant application was filed. The claimed plant is within the “knowledge of those skilled in the art” by virtue of its public availability. One skilled in the art would thus have known “how to make” the claimed plant upon reading the cited publications, by purchasing a clone of the plant and asexually propagating it by cuttings or any other known method in the art. Thus, the publications provide an enabling disclosure when combined with the knowledge of the skilled artisan.

Relative to applicant’s continuing insistence that the *LeGrice* Court knew the plant was on sale because the Board said so, it must again be mentioned that the question of “publication plus sale” was not before the Court; only the question of “publication alone” was before them. Further, there does not appear to be any evidence of sale, just a conclusion by the Board that does not appear to be based upon any substantive evidence. As noted above, copies of the catalogue publications were not provided by the applicant – how could the examiner or the Board have known precisely what they disclosed? Not only was the Board’s statement conclusory without any evidence, but this conclusion was followed by a further conclusion that public use or sale would have been irrelevant in any regard, as the references would be proper prior art in and of themselves. Therefore, the *LeGrice* Court was not reviewing (or implicitly

agreeing with) the statements by the Board regarding public use or sale, but rather was reviewing the Board's decision, which, explicitly, did not involve public use or sale enablement issues.

The Examiner agrees that the publication "by itself" would not enable a person skilled in the art to reproduce the claimed plant. However, the availability of the plant whether through sale or other form of public availability would enable the disclosure of the printed publication. Applicant cites *Ex Parte Argoudelis*, *De Boer*, *Eble and Herr* as supporting the proposition that public availability of the disclosed biological material does not enable a printed publication. In this case, the Board reversed the examiner's rejection under section 102(b), which was based on a printed publication disclosing a microorganism which was not readily available to the public. The *LeGrice* decision was cited extensively. It is noteworthy that the Board did not require that one skilled in the art must be capable of independently creating or isolating the microbial strain – only that one so skilled be able to obtain the microbial strain.

The *Argoudelis* Board stated, "...this affidavit confirms that the invention cannot be reproduced from the written description since it specifically refers to the fact that access to the microorganism used is necessary. It is obvious that, with the microorganism at hand, the invention can be reproduced." It was also affirmed that, "The person skilled in the art is supposed to have before him whatever is known and available to such persons skilled in the art" (157 USPQ 437, 442).

In reversing the rejection under section 102(b), the Board reasoned, "In the prior appeal appellants urged, among other matters, that the reference did not contain a sufficient description of the organism mentioned. In Appeal No. 717-72, in a commonly assigned application, which was heard at the same time as the first hearing in the present appeal the question involved was the utilization against the applicants of a disclosure in a foreign specification which contained

such description of the organism and was otherwise similar to the disclosure in *Ex parte Kropp*. Counsel argued in the brief that such a disclosure is meaningless, 'just as meaningless as if a 'philosopher's stone' were recited as usable to make' the antibiotic. In that case the rejection of the examiner was reversed, predicated upon the insufficiency of the disclosure 'in the absence of any evidence of what may have been known or available to the public on the date involved,' citing *Ex parte Kropp* and *In re LeGrice*. In view of this, therefore, we believe that the rejection on the Anzai publication should not be pressed and this rejection will not be affirmed" (157 USPQ 437, 443, citations omitted). Clearly, the Board was of the opinion that public availability of the required biological material is relevant in determining whether a foreign publication provides an enabling disclosure.

The contention that foreign commercial availability or public use is not a bar to patentability under 35 U.S.C. 102(b) (brief, pp. 14-15) is noted but is not relevant. The clear wording of 35 U.S.C. 102(b) is "A person shall be entitled to a patent unless - ... (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States...". There is no geographic limitation of the bar under 35 U.S.C. 102(b) to printed publications in this country. There is no requirement that a printed publication that describes the invention be printed or enabled in this country. The second clause of 35 U.S.C. 102(b) barring public sale or use in this country is not relevant because as noted above, the current rejection under 35 U.S.C. 102(b) is based on foreign published documents ("printed publications"), as enabled by the admitted public availability of the plants outside the United States more than one year prior to the date of domestic filing.

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That the claimed plant was not available in the United States more than one year prior to the date of domestic filing is not persuasive to patentability, as there is no geographic component of enablement. For a patent specification to be enabling, there is no requirement that the starting material required to produce the claimed invention must be located in the United States. See, for example, *Ex parte Rinehart* 10 USPQ2d 1719, 1720 (Bd. Pat. App. & Inter. 1989), where a specification was found to be enabling even though the required biological material was not deposited, but was obtainable from specified locations in the ocean (specifically, only off the coast of Central and South America, as described in U.S. Patent 4,548,814, col. 1, lines 43-60).

Applicant asserts that the plant at issue in *LeGrice* was available only in a foreign country, and that the fact situation there is the same as in the instant application. This assertion is incorrect. In *LeGrice*, applicant never admitted that the rose cultivar was on sale anywhere. Instead applicant acknowledged, "Prior public use or sale are the avenues by which a plant enters the public domain" (133 USPQ at 371).

There is no indication in the *LeGrice* decision that the Court considered whether the claimed plant had been on sale. The *LeGrice* decision repeatedly returns to the question of whether the invention "was in the possession of the public" based solely on the words set forth in the printed publications. As stated by the Board in *Thomson*, "the court's holding was based on the specific 'printed publications' before it, and no indication was given that the 'prior catalogue publication' before it evidenced commercial availability in a readily enabling form." 24 USPQ2d at 1621.

"The rejection is not over a combination of two events but the publication alone..." The paragraph continues to state, "Foreign availability is evidence that supports the enabling nature

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of the publication.” As repeated above, the rejection is based upon the publication and the sale or public availability of the disclosed plant is evidence that the disclosure was enabling.

In re Samour 571 F.2d 559, 197 USPQ 1 (CCPA 1978) and *In re Donohue*, 766 F.2d 531, 226 USPQ 619 (Fed. Cir. 1985) do not support use of the publication and foreign availability on which the rejection is based (brief, pp. 16-17). In *Samour* as in *Donohue*, the secondary evidence, such as other patents or publications to show the state of the art, can be cited to show that the primary reference contains an “enabling disclosure.” The Court states in *In re Donohue* (226 USPQ at 621):

It is well settled that prior art under 35 U.S.C. § 102(b) must sufficiently describe the claimed invention to have placed the public in possession of it. 7 *In re Sasse*, 629 F.2d 675, 681, 207 USPQ 107, 111 (CCPA 1980); *In re Samour*, 571 F.2d at 562, 197 USPQ at 4; see also *Reading & Bates Construction Co. v. Baker Energy Resources Corp.*, 748 F.2d 64, 651-52, 223 USPQ 1168, 1173 (Fed. Cir. 1984). Such possession is effected if one of ordinary skill in the art could have combined the publication's description of the invention with his own knowledge to make the claimed invention. See *In re LeGrice*, 301 F.2d at 939, 133 USPQ at 373-74. Accordingly, even if the claimed invention is disclosed in a printed publication, that disclosure will not suffice as prior art if it was not enabling. In *re Borst*, 345 F.2d 851, 855, 45 USPQ 554, 557 (CCPA 1965), cert. denied, 382 U.S. 973, 148 USPQ 771 (1966.) It is not, however, necessary that an invention disclosed in a publication shall have actually been made in order to satisfy the enablement requirement.

Therefore, a foreign disclosure describing the claimed subject matter, published over a year prior to the filing of the domestic application, is an enabling bar under 35 USC § 102(b) where the plant stock necessary for propagation could have been obtained over a year prior to domestic filing of an application.

Applicant asserts that the Examiner has not provided any authority supporting the statement that enablement need not be in the United States (brief, p. 18). This concept is hardly

novel, and is supported by *Ex Parte Rinehart* and *Ex Parte Argoudelis*, both discussed above. In contrast, applicant has not provided any support for the opposite view.

Public notice of a Plant Breeder's Right application informs the public of the existence of the plant. Sale or other public use of said plant then puts it within the knowledge of one skilled in the art. If a printed publication, when taken in conjunction with the knowledge of those skilled in the art, provides an enabling disclosure, then the printed publication can be a statutory bar. The following is a passage from *LeGrice*, 133 USPQ at 379:

The mere description of the plant is not necessarily an "enabling" disclosure. Such descriptions, just as in the case of other types of inventions, in order to bar the issuance of a patent, must be capable, when taken in conjunction with the knowledge of those skilled in the art to which they pertain, of placing the invention in the possession of those so skilled.

The information in the relied-upon printed publications taken in conjunction with the knowledge of those skilled in the art (including the sale or public availability of the plant and methods of asexual propagation) would enable a person skilled in the art to reproduce the plant, thus the publication is a statutory bar under 35 U.S.C. 102(b).

Appellant argues that the rejection is improper because the reference relied on does not teach every aspect of the claim, and that references may not be combined in a rejection under 35 U.S.C. 102. These arguments are not persuasive for two reasons. First, applicant has admitted that the plant disclosed in the references is the same plant which is now claimed. Therefore the prior art plant inherently possesses all the characteristics of the claimed plant. Appellant has not pointed out what "aspect" of the claimed plant is missing from the plant as disclosed in the prior art. Second, there is no other reference. Applicant has not explained how the admission that the plant was publicly available constitutes a "reference." Even if one

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were to assume, *arguendo*, that this admission is a reference, it is not used to compensate for any "deficiency" in the primary reference. Applicant's admission is being used only to document that the claimed invention was in possession of the public, which is permissible in a rejection under section 102. See MPEP 2101.01.

For the reasons stated above the rejections have been maintained.

The above listing may not be complete. Applicants should carefully compare the claimed plant with the botanical description set forth in the specification to ensure the completeness and accuracy and to distinguish the plant within this expanding market class. Any further botanical information should be imported into the specification, as should any additional or corrected information relative to the same.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Claim Rejection

35 USC § 112, 1st and 2nd Paragraphs

Claim 1 is rejected under 35 U.S.C. 112, first and second paragraphs as not being supported by a clear and complete botanical description of the plant for reasons set forth in the Objection to the Disclosure Section above.

Claim Rejection

35 USC § 102 (b)

Claim 1 is rejected under 35 U.S.C. 102 (b), as having been patented or described in a printed publication in this or a foreign country or in public use or on sale in this or a foreign country, more than one year prior to the date of this application for patent in the United States.

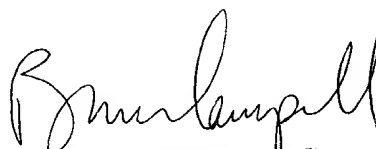
Future Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michelle Kizilkaya whose telephone number is (571) 272-0978. The Examiner can normally be reached Monday through Friday from 9:00 a.m. to 5:00 p.m.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Bruce Campell, can be reached on (571) 272-0974. The fax number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0196.

MRK


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